

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for transfer) DOCKET NO. 950265-SU
of facilities of L.C.M. Sewer) ORDER NO. PSC-95-1040-FOF-SU
Authority, Inc. to Bonita) ISSUED: August 21, 1995
Springs Utilities, Inc. in Lee)
County, and cancellation of)
Certificate No. 352-S.)
_____)

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER APPROVING TRANSFER, CANCELLING
CERTIFICATE NO. 352-S AND CLOSING DOCKET

AND

ORDER NOT TO SHOW CAUSE

BY THE COMMISSION:

BACKGROUND

L.C.M. Sewer Authority, Inc. (LCM) is a Class C utility providing wastewater service in Lee County. LCM was granted Certificate No. 352-S by Order No. 13119, issued March 22, 1984. LCM is serving approximately 222 customers. LCM's 1993 Annual Report shows total operating revenue of \$50,031 and a net loss of \$58,836.

On November 20, 1992, the Circuit Court of the Twentieth Judicial Circuit in Lee County, Florida, issued an Order Granting Former Receiver's Motion to Withdraw as Receiver, and Appointing New Receiver, Water Spectrum Inc. (WSI). We acknowledged the appointment of WSI as receiver by Order No. PSC-93-0374-FOF-SU, issued March 9, 1993.

On January 6, 1994, WSI filed an application to transfer LCM's wastewater certificate to Landis Enterprises, Inc. In addition to three objections, Bonita Springs Utilities, Inc. (BSU) filed a petition for a formal administrative hearing. Landis Enterprises,

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Inc. filed a Motion to Dismiss BSU's petition. On February 22, 1994, BSU responded to Landis Enterprises, Inc. Motion to Dismiss. BSU filed a petition with the Court wherein it requested that the Court appoint BSU the final receiver of LCM. On September 22, 1994, the Court ordered that BSU "will be given immediate access to make all matters necessary to transfer the system." The same order gave WSI ninety days to liquidate its receivership. We contacted BSU on December 27, 1994, and confirmed that BSU is now fully interconnected with LCM. On January 18, 1995, we received documentation from BSU officially confirming the interconnection. This matter was closed by Order No. PSC-95-0221-FOF-SU, issued February 17, 1995.

APPLICATION

On March 8, 1995, BSU filed an application for the transfer of LCM's assets and cancellation of LCM's wastewater certificate. BSU is a member-owned non-profit corporation which was formed on January 7, 1970, to provide water and wastewater service in Lee County. BSU is registered with the Office of the Florida Secretary of State as a non-profit entity and has fulfilled all of the requirements to obtain exempt status with the Florida Public Service Commission since 1971.

The application is in compliance with the governing statute, Section 367.071, Florida Statutes, and other pertinent statutes and administrative rules concerning an application for transfer of utility assets. The application contains a check for wastewater service totaling \$750.00 which is the correct filing fee pursuant to Rule 25-30.020, Florida Administrative Code. The applicant provided evidence in the form of a warranty deed that the utility owns the land upon which the utility's facilities are located as required by Rule 25-30.037(1)(o), Florida Administrative Code. In addition, the application contains proof of compliance with the noticing provisions set forth in Rule 25-30.030, Florida Administrative Code, including notice to the customers of the system to be transferred.

BSU informed us that all of LCM's utility assets were transferred to BSU by judicial order, dated September 22, 1994, by Judge Lynn Gerald, Jr. for the Circuit Court of the Twentieth Judicial Circuit. BSU closed the treatment plant facilities and effluent disposal percolation pond system of LCM. On January 18, 1995, we received official documentation from BSU that it had interconnected to the LCM wastewater system.

BSU's application requests that the transfer include all assets of LCM, the sanitary wastewater collection, treatment and

effluent disposal system. BSU provided us with a system map demonstrating the interconnection between the two wastewater systems. In order to serve the LCM customers, BSU made considerable additions and improvements to the wastewater system, including upgrading the lift stations, constructing wastewater mains to interconnect the LCM customers with the wastewater transmission system, and waiving the normal interconnection fee. The LCM customers have been fitted with individual meters and their wastewater rates have changed to the standard rate for BSU service. LCM customer deposits were credited to appropriate accounts in the final billing cycle prior to interconnection with BSU.

BSU is an established operating entity and has a record of providing adequate utility service. The utility has consistently met Department of Environmental Protection (DEP) standards and provided customers with quality service. BSU has no outstanding violations.

Adequate service territory and system maps and a territory description have been provided as prescribed by Rule 25-30.035(9), (10), and (11), Florida Administrative Code. The territory requested by the applicant was verified in a previous transfer and is known to be consistent with the service area in Order No. PSC-93-1850-FOF-SU, issued December 30, 1993.

The customers should experience consistent service provided within DEP standards. Further, the customers will continue to receive water service from BSU. Therefore, we find that this transfer is in the public interest and that BSU is capable of fulfilling the commitments, obligations and representations of LCM. BSU already has attained exempt status which will therefore result in the cancellation of LCM's wastewater certificate. BSU shall retain its exempt status since it will add the new customers as members of the non-profit cooperative. Therefore, the transfer of LCM to BSU is hereby approved and Certificate No. 352-S shall be cancelled.

NO SHOW CAUSE REQUIRED

As previously mentioned, on February 22, 1994, BSU filed a motion in Circuit Court to become final receiver of LCM. On September 22, 1994, Judge Lynn Gerald, Jr. issued an order appointing BSU as LCM's final receiver and ordered the former receiver, WSI, ninety days to liquidate its receivership. On December 27, 1994, we contacted BSU to learn when the interconnection would occur. BSU informed us that the interconnection had already occurred. On January 18, 1995, we received the appropriate documentation.

Section 367.071(1), Florida Statutes, requires that no utility may transfer its facilities without determination and approval of the Commission that the buyer will fulfill the commitments, obligations, and representations of the utility. Section 367.161(1), Florida Statutes, authorizes the Commission to assess a penalty of not more than \$5,000 for each offense, if a utility is found to have knowingly refused to comply with, or to have willfully violated, any provision of Chapter 367, Florida Statutes.

Utilities are charged with the knowledge of the Commission's rules and statutes. Additionally, "[i]t is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833). Thus, any intentional act, such as the utility's failure to obtain antecedent Commission approval to transfer the majority organizational control of its corporate grandparent, would meet the standard for a "willful violation." In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL titled In Re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., Relating To Tax Savings Refund for 1988 and 1989 For GTE Florida, Inc., the Commission, having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "'willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6.

Failure to obtain the approval by the Commission prior to completing a transfer of a utility's facilities is an apparent violation of Section 367.071(1), Florida Statutes. There are, however, circumstances which mitigate this utility's violation. As noted above, WSI, as receiver of LCM, was ordered to liquidate its receivership within ninety days by the Court. Further, the Court Order stated that BSU will be given immediate access to make all matters necessary to transfer the system. When the Circuit Court issued its order, LCM, at that time, was not able to provide customers with adequate service. In the face of this emergency, BSU believed it was necessary to interconnect its system with LCM's. Although the Commission is the proper authority to approve the transfer of a utility, we hold that it was in the public interest to provide adequate quality of service by way of interconnection first before filing the transfer application.

Once this matter came to our attention, we advised BSU that it shall immediately file a transfer application pursuant to Section 367.071, Florida Statutes. On January 18, 1995, BSU advised us that it would file a transfer application within a few weeks. The utility cooperated by filing its application. Therefore, we do not believe that this utility's apparent violation of Section

367.071(1), Florida Statutes, rises to the level of warranting that a show cause order be issued. Therefore, LCM shall not be ordered to show cause why it should not be fined for failing to obtain the Commission's approval of the transfer of the utility's facilities prior to the date of the transfer.

Based on the foregoing, it is, therefore,

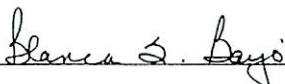
ORDERED by the Florida Public Service Commission that the transfer of L.C.M. Sewer Authority Inc. to Bonita Springs Utilities, Inc. is hereby approved. It is further

ORDERED that Certificate No. 352-S is hereby cancelled. It is further

ORDERED that LCM shall not show cause why it should not be fined for failing to obtain the Commission's approval of the transfer of the utility's facilities prior to the date of the transfer. It is further

ORDERED that this docket is hereby closed.

By ORDER of the Florida Public Service Commission, this 21st day of August, 1995.



BLANCA S. BAYO, Director
Division of Records and Reporting

(S E A L)

MSN

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.